

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION
3 UNITED STATES OF AMERICA,) Case 1:18-cr-00457
4)
Plaintiff,)
5)
v.) Alexandria, Virginia
6) March 29, 2019
BIJAN RAFIEKIAN,) 9:02 a.m.
7)
Defendant.)
8) Pages 1 - 44

9 TRANSCRIPT OF
10 NON-PARTY COVINGTON & BURLING LLP'S MOTION TO QUASH
11 AND
12 NON-PARTY KRISTEN VERDERAME'S MOTION TO QUASH
13 BEFORE THE HONORABLE ANTHONY J. TRENGA
14 UNITED STATES DISTRICT COURT JUDGE

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25 COMPUTERIZED TRANSCRIPTION OF STENOGRAPHIC NOTES

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1 THE CLERK: Criminal Case 1:18-cr-457, *United*
2 *States v. Bijan Rafiekian*.

3 Counsel, will you please note your
4 appearances for the record.

5 MR. JOHNSON: Good morning, Your Honor. Dan
6 Johnson for movant non-party Covington & Burling LLP.
7 With me at counsel's table is my partner, Robert
8 Kelner.

9 THE COURT: All right. Welcome.

10 MR. WALKER: Good morning, Your Honor.
11 Robert Walker for non-party Kristen Verderame with
12 Brandon Moss at the table with me.

13 THE COURT: All right. Welcome.

14 MR. MACDOUGALL: Good morning, Your Honor.
15 Mark MacDougall with Akin Gump. With me is Robert
16 Trout and also Jack Murphy, whose admission/petition
17 *pro hac vice* is pending from the Southern District of
18 New York, on behalf of the defendant in this case,
19 Bijan Rafiekian, who has, again, waived his right to
20 appear.

21 THE COURT: Has he submitted a written
22 waiver?

23 MR. TROUT: I will get it done, Your Honor.

24 THE COURT: All right.

25 MR. MACDOUGALL: Thank you, Your Honor.

1 THE COURT: We're here on the non-parties'
2 motion to quash the subpoena. I've reviewed the
3 briefing.

4 Let me first ask Mr. MacDougall or Mr. Trout:
5 Am I correct that the only item that's at issue here is
6 category 8 of the subpoena, Mr. MacDougall?

7 MR. MACDOUGALL: Your Honor, with --

8 THE COURT: Yes, please.

9 MR. MACDOUGALL: With respect to Covington,
10 we did receive a production of those documents. We
11 also received this week a 67,000-page production that
12 we have not digested yet that they can explain in
13 greater detail to the Court. Evidently, it relates to
14 what was produced to the government as a subset.

15 We have not received any production from
16 Ms. Verderame.

17 THE COURT: All right.

18 MR. MACDOUGALL: Thank you.

19 THE COURT: Let me hear from the non-party
20 Covington.

21 I take it Covington has produced everything
22 in the first seven categories.

23 MR. JOHNSON: Yes, Your Honor.

24 THE COURT: All right.

25 MR. JOHNSON: And with respect to

1 category 8 --

2 THE COURT: Yes.

3 MR. JOHNSON: -- we've produced all documents
4 from Covington's files that Covington had provided to
5 the U.S. government on behalf of Flynn Intel Group,
6 which I will call FIG. Those are the documents that
7 Mr. MacDougall was referring to. We produced those on
8 Monday.

9 With respect to the remainder of category 8,
10 the Court should quash the subpoena for three reasons:

11 First, the defendant has not met his burden
12 of showing the three factors under *Nixon*.

13 Second, the remainder of the subpoena, the
14 part we have not yet produced and object to, seeks
15 privileged and work product documents from our files
16 that the firm is ethically bound not to produce.

17 Third, the remaining part of the subpoena is
18 unduly burdensome. The portion we have not provided
19 from our FIG files are thousands of e-mails, notes, and
20 other work product that the firm generated over 27
21 months of representation of FIG and of General Flynn.
22 The vast majority of those documents have nothing to do
23 with any of the issues that are alleged in the
24 indictment.

25 So, first, with respect to the *Nixon* factors,

1 the defendant has the burden of showing specificity,
2 relevance, and admissibility, and he can't meet any of
3 those and has not met any of those factors. With
4 respect to specificity --

5 THE COURT: Let's first talk about relevance.

6 MR. JOHNSON: Certainly.

7 THE COURT: Here the allegation and the core
8 of the indictment is that Mr. Rafiekian caused
9 Covington to file a false FARA filing. Given that core
10 allegation, why isn't anything pertaining to what
11 Covington received, what information it received, what
12 questions it asked, and why it did what it did
13 relevant?

14 MR. JOHNSON: Some of those documents -- as
15 we say in our papers, some of those documents may be
16 relevant, but those documents would not be admissible.
17 Because what I understand the defendant is looking for
18 and what we have in our files are -- principally, the
19 documents that would be relevant would be our notes of
20 interviews, work product notes of interviews which --

21 THE COURT: Right. Which would reflect what
22 Covington obtained and how Covington assessed that
23 information and presumably relate to what caused
24 Covington to compose the FARA application as it did,
25 correct?

1 MR. JOHNSON: Some of that -- correct, some
2 of that would be fact work product, Your Honor. But
3 intermingled within that is opinion work product, and
4 then we simultaneously represented General Flynn. So
5 there are General Flynn's information in there.

6 THE COURT: Putting aside Flynn for a moment
7 if we can distinguish. I'm not sure if you can with
8 respect to the FARA application. But why wouldn't
9 Covington's opinions, its thought processes and
10 statements as far as its assessment of the information
11 it received and why and how that information made
12 appropriate what it said in the application all be
13 relevant to the prosecution against Rafiekian, which is
14 that he knowingly caused Covington to make false
15 applications? Wouldn't Covington's assessment of the
16 information it received from Rafiekian and others go to
17 what caused Covington to do what it did?

18 MR. JOHNSON: I don't think so, Your Honor.
19 The fact work product, the facts of what Mr. Rafiekian
20 said to the firm could be relevant, but our impressions
21 of that, in my view, would not be relevant. In any
22 event, that would be opinion work product which the
23 Fourth Circuit has found is not discoverable under
24 these circumstances.

25 THE COURT: Well, you say under these

1 circumstances. I'm not sure there's a comparable
2 circumstance, at least that I've found, that would
3 address this. Is there? Is there a case that really
4 has comparable circumstances?

5 MR. JOHNSON: Well, what I know -- I can't
6 cite a specific case, Your Honor, that's on point.
7 What I know is that the guidance that the Fourth
8 Circuit has issued, which is that opinion work product
9 is virtually never discoverable and because there's no
10 purpose to be served by the defendant in a criminal
11 context getting access to our impressions about what
12 our thoughts were regarding the case, the merits of the
13 case, the legal issues, the assessment of the strategy
14 for the clients at the time.

15 The fact work product is different. What was
16 said by Rafiekian, that would be fact work product, and
17 we concede that that could be relevant in this case.
18 But to sift that out of what we have in the files would
19 be burdensome.

20 THE COURT: That's a different issue.

21 But you don't think that what Covington's
22 thought process was that caused it to answer the
23 questions in the fashion that it did is relevant to the
24 government's claim that Rafiekian caused Covington to
25 file a false FARA application?

1 MR. JOHNSON: I think the facts that
2 Mr. Rafiekian provided would be relevant. There could
3 be an argument certainly, Your Honor, that our --

4 THE COURT: Well, how about other facts that
5 Covington had available to it that it used in its
6 assessment of how to answer that question?

7 MR. JOHNSON: Yes. That would also be fact
8 work product, Your Honor, that would be of the type of
9 what Mr. Rafiekian said. But our assessment would --
10 in my view, would not be relevant and, in any event,
11 would not be admissible. So even if the defendant gets
12 over the relevance hurdle, he can't get over the
13 admissibility hurdle because whatever Covington thought
14 couldn't be used.

15 They say they want the information to be able
16 to impeach General Flynn if and when he testifies in
17 Mr. Rafiekian's case. As we point out in the Second
18 Circuit case in *Almonte*, that would not be admissible
19 to impeach General Flynn's testimony or anybody else's
20 testimony. What Mr. Kelner or anybody else thought
21 when they received information, those notes couldn't be
22 used because they're inadmissible hearsay.

23 THE COURT: All right.

24 MR. JOHNSON: With respect to the other
25 factor of *Nixon* which we haven't yet addressed, Your

1 Honor, with respect to specificity, as Judge Cachieris
2 wrote in a case we cited in our papers, this type of
3 request for the entire file is a paradigm of a
4 nonspecific request that under *Nixon* can't survive.
5 Therefore, a subpoena that lacks specificity must be
6 quashed.

7 They're seeking information from the
8 beginning of our representation, which began in
9 December 2016, up until the present.

10 THE COURT: Insofar as it relates to the FARA
11 filing.

12 MR. JOHNSON: Well, that is, in my view, the
13 best reading of the subpoena, but I understand in
14 conversations that Mr. MacDougall and Mr. Trout have
15 had with Ms. Verderame's counsel that they're seeking
16 the entire file.

17 THE COURT: I understand, but the subpoena
18 makes it pretty clear it's the file relating to the
19 FARA filing.

20 MR. JOHNSON: So with the file, there's no
21 separate folder just for the FARA filing.

22 THE COURT: Right.

23 MR. JOHNSON: Within the folder are documents
24 relating to our representation of FIG and Flynn with
25 respect to the FARA filing, and then, of course, there

1 are other documents in there because the representation
2 has continued on other issues for FIG. And with
3 respect to General Flynn, other and separate issues
4 than FIG. So asking us to produce the entire file
5 would be completely overbroad, but going back and
6 trying to select particular documents would be
7 burdensome.

8 It, frankly, would be easier, Your Honor, as
9 we point out in our papers -- not easy but easier if
10 the subpoena were limited to documents preceding the
11 March 7, 2017, FARA filing. If that were the specific
12 request that they ask, particular documents preceding
13 that date, then there would be some specificity. As it
14 is, they're just asking for the entire file.

15 Even in a civil context, Your Honor, that
16 would not be sufficient. Here in a criminal context,
17 under *Nixon*, they have to be specific.

18 Moreover, even if they satisfied the *Nixon*
19 factors, the documents that they're seeking are
20 privileged and work product documents. These are
21 lawyer files generated over 27 months during the
22 representation of two different clients. There's no
23 balancing test that can be done for the privileged
24 documents. The Supreme Court has made that clear in
25 *Swidler*. The defendant's interest in discovery must

1 yield to that attorney-client privilege.

2 FIG has a continuing interest because they
3 are still subject to investigations. There is a
4 congressional investigation that's been ongoing. So
5 FIG has an interest in preserving its privilege and the
6 work product because of these ongoing matters.

7 THE COURT: How is Rafiekian's relationship
8 to the privilege any different than Flynn's?

9 MR. JOHNSON: The difference is the purpose
10 for which they are asserting them.

11 THE COURT: Right. How is it different?

12 MR. JOHNSON: With respect to General
13 Flynn -- we're speaking of FIG as opposed to General
14 Flynn's privilege.

15 THE COURT: Right.

16 MR. JOHNSON: With respect to FIG, General
17 Flynn is the chairman and CEO of the corporation. He
18 made a decision to waive the privilege with respect to
19 a narrow area, which I'll address. But to answer your
20 question directly, he did that in the interest of FIG
21 because FIG was subject to prosecution at the time.
22 And in his estimation, it made sense for FIG to
23 cooperate with the government by waiving the privilege
24 with respect to the narrow area in which it was waived.

25 Mr. Rafiekian -- that was for a corporate

1 purpose. Mr. Rafiekian, on the other hand, is seeking
2 documents purely for his personal purpose, not for a
3 FIG purpose.

4 THE COURT: Well, the purposes conflate,
5 don't they? By getting himself cleared, he is clearing
6 FIG, just as by Flynn trying to clear himself, he was
7 clearing FIG, correct?

8 MR. JOHNSON: That's not the way -- it wasn't
9 Flynn trying to clear himself to clear FIG. It was
10 Flynn acting on behalf of FIG to clear FIG to cooperate
11 with the government.

12 THE COURT: Right. In order to establish
13 that, it would include, among other things,
14 establishing that the officers and directors had not
15 acted improperly, correct? That they were not false
16 statements made by its officers or directors since that
17 conduct can be attributed to the corporation for
18 liability purposes; isn't that correct?

19 MR. JOHNSON: Their conduct could be
20 attributed to the corporation.

21 THE COURT: Right. So if Rafiekian clears
22 himself, he's effectively serving the corporate purpose
23 of clearing the corporation; isn't he?

24 MR. JOHNSON: I don't see any alignment of
25 the interest between Rafiekian and FIG in this instance

1 because by seeking the documents, he's effectively
2 waiving FIG's privilege beyond any -- the narrow waiver
3 that FIG has already agreed to with respect to the
4 prior advice -- pre-Covington advice of Mr. Kelly and
5 Mr. Spencer, the compliance advice that preceded
6 Covington's engagement.

7 That information was provided both to the
8 government at defendant's request and to Mr. Rafiekian.
9 So he has those documents that FIG in the FIG corporate
10 conclusion provided to the government and did engage in
11 the narrow waiver of the privilege.

12 Mr. Rafiekian's point or his goal on the
13 other hand is to get all the FIG documents which could
14 affect a waiver of FIG's privilege with respect to
15 these other matters, and that's completely contrary to
16 FIG's interest.

17 THE COURT: Is Flynn, in your view, in a
18 position to have access to all the documents that
19 Rafiekian is seeking?

20 MR. JOHNSON: As the chairman and CEO, he
21 would have access to those documents if he's doing so
22 in the corporate interest, yes.

23 THE COURT: And Rafiekian is the vice
24 chairman and president, secretary, and treasurer and a
25 major shareholder, as Flynn, neither of which, as I

1 understand it, are majority shareholders. Is that
2 right?

3 MR. JOHNSON: I'm sorry? I didn't hear the
4 last part.

5 THE COURT: Neither Flynn or Rafiekian are
6 majority shareholders, but they're both principal
7 shareholders of the company; is that right?

8 MR. JOHNSON: Mr. Flynn holds more shares,
9 and he has a superior office to Mr. Rafiekian within
10 FIG. So, therefore, he has the authority to make these
11 decisions, and Mr. Rafiekian does not.

12 But the key is the purpose for which --

13 THE COURT: And Rafiekian, as I understand
14 the defendant's filing, contributed to the payment of
15 Covington's fees for representation. Is that right?

16 MR. JOHNSON: FIG paid those fees. Whether
17 he contributed to FIG, I don't know the answer to that,
18 Your Honor. I see what's in their papers, and I don't
19 know the answer.

20 THE COURT: Covington sought Rafiekian's
21 consent to the limited waiver that was given to the
22 government --

23 MR. JOHNSON: It was actually at the
24 suggestion of defendant's counsel.

25 THE COURT: Okay. All right.

1 MR. JOHNSON: But the difference here is the
2 purpose, Your Honor, and the effect. If you were to
3 allow them to have access to all of these documents,
4 it's Mr. Rafiekian's purpose, which is not consistent
5 with FIG's purpose as decided by the --

6 THE COURT: Why isn't it? How is it adverse?
7 How is Rafiekian's effort to clear himself adverse to
8 FIG?

9 MR. JOHNSON: Because of what he's trying to
10 do with the documents, and the effect of having access
11 to those documents is that the privilege would be
12 waived. That is adverse to FIG's interest clearly.
13 FIG -- one could --

14 THE COURT: But you think that if Flynn had
15 been prosecuted for this, he would have access to what
16 Rafiekian is seeking?

17 MR. JOHNSON: I think that as the chairman
18 and CEO, he could have access to that. The difference
19 is he is the superior officer, Your Honor. As a matter
20 of corporate law, it is his decision to make. It's not
21 Mr. Rafiekian's decision to make in the first instance.
22 Second, the purpose for which they're seeking is
23 different. Then, third, the effect of enforcing the
24 subpoena and allowing Mr. Rafiekian and his counsel to
25 have access to the data is that it affects a waiver of

1 the FIG privilege, which is clearly contrary to FIG's
2 interest.

3 So whether Mr. Rafiekian and Mr. Flynn
4 individually may have similar -- or interest in their
5 personal capacity, once Mr. Rafiekian tries to get
6 these documents to waive FIG's privilege, he is clearly
7 acting contrary to the interest of the corporation
8 which is still under investigation and whose CEO and
9 chairman has decided --

10 THE COURT: Do you see crime fraud exception
11 implicated in any of this?

12 MR. JOHNSON: No, Your Honor, and the
13 defendant has not alleged that.

14 THE COURT: Well, given that the government
15 is claiming that the services of counsel were used for
16 the purposes of perpetrating a fraud, why wouldn't it
17 be implicated in some fashion?

18 MR. JOHNSON: The indictment, as I understand
19 it, is that Mr. Rafiekian misled the government.

20 THE COURT: Right, for the purposes of
21 avoiding disclosures that were required.

22 MR. JOHNSON: Correct. Neither the
23 government, nor the defendant has suggested that the
24 crime fraud exception applies. There's --

25 THE COURT: I understand that, but I'm asking

1 why it wouldn't be implicated.

2 MR. JOHNSON: I understand. There's no
3 suggestion that Covington participated in any crime or
4 fraud.

5 THE COURT: No. I'm not suggesting that, and
6 that's not required for the crime fraud exception.
7 It's whether the client has used the relationship for
8 the purposes of perpetrating a fraud.

9 MR. JOHNSON: And our position, Your Honor,
10 is that there is no crime fraud exception applicable
11 here.

12 THE COURT: All right.

13 MR. JOHNSON: Whether he misled us, I think
14 they also have to show that Covington was somehow a
15 participant or knew that -- or had reason to know that
16 there was some crime or fraud being perpetrated in the
17 course of their representation, and there is no
18 evidence whatsoever of that, Your Honor.

19 THE COURT: All right.

20 MR. JOHNSON: With respect to the -- if I may
21 get back to the issue of the privilege --

22 THE COURT: Yes.

23 MR. JOHNSON: -- and the waiver. As I
24 mentioned, under *Swidler*, there's no balancing to be
25 done. The attorney-client information, the privileged

1 information is not subject to production.

2 Under the Fourth Circuit test, the opinion
3 work product also is not subject to production.

4 Fact work product is potentially different.
5 There is a balancing test. But again, even if it's
6 relevant, it's not admissible as previously pointed
7 out. So there would be no point in them getting access
8 to the data.

9 Much of the briefing is focused on whether
10 there was a waiver and the extent of the waiver of the
11 privilege. There was no waiver beyond the documents
12 that the defendant already has, and FIG is not picking
13 or choosing doing a sword or a shield here. FIG did
14 waive at defendant's request the attorney-client
15 privilege regarding the compliance advice that
16 Messrs. Kelly and Spencer had provided in the fall of
17 2017 regarding LDA and FARA compliance.

18 At defendant's request, we provided the Kelly
19 declaration to the government, and then naturally, as a
20 result of providing that declaration, that caused a
21 narrow waiver of the privilege with respect to
22 Mr. Kelly and Mr. Spencer's advice. Defendant has all
23 of those documents already. So with respect to the
24 narrow area of the waiver, they've already got them.

25 Our representation, Covington's

1 representation of FIG and of Flynn involved different
2 subject matters. It started later after Kelly and
3 Spencer advice and after FIG had decided not to make a
4 FARA filing.

5 THE COURT: Covington was retained in
6 December 2017?

7 MR. JOHNSON: December 2016, Your Honor.

8 THE COURT: '16. The filing was in March of
9 the following year?

10 MR. JOHNSON: Yes. That came -- and the
11 reason we were retained was DOJ had launched an
12 investigation of FIG regarding the fact that they had
13 not filed under FARA, different subject matters.
14 Client's advice by Kelly and Spencer, the investigation
15 by Covington.

16 THE COURT: Right.

17 MR. JOHNSON: Only then was Covington engaged
18 and only for the investigation. Now, as a result of
19 that, we did make a FARA filing, as Your Honor is
20 aware, on March 7, 2017. It's the events leading up to
21 that FARA filing specific to that filing that are at
22 issue in the indictment, and in our view, those are the
23 only documents that could be relevant.

24 Defendant also contends that there was some
25 waiver when Covington attorneys at FIG's direction

1 agreed to be interviewed by the government with respect
2 to the events -- the facts preceding -- certain facts
3 preceding that March 7, 2017, FARA filing. The
4 interviews were focused solely on those facts. Those
5 facts were not privileged because facts are not
6 privileged. Therefore, those interviews did not affect
7 any waiver whatsoever.

8 The interviews addressed only that topic, not
9 any other subject matters, did not get into any opinion
10 work product or other work product of Covington. In
11 fact, we -- the government did not ask, and we did not
12 produce documents as part of that process.

13 So there was no waiver of any subject matters
14 of Covington's representation of FIG or of Flynn. The
15 only narrow waiver had to do with the Kelly and Spencer
16 compliance advice.

17 With respect to the burden, Your Honor, as I
18 pointed out, there are thousands of e-mails. A part of
19 the subpoena to which we have not responded and to
20 which we object, a portion of category 8, thousands of
21 e-mails, notes, and other work product and
22 communications with the client that Covington has had
23 and has generated over 27 months -- it's been two years
24 since the FARA filing, and we have continued to
25 represent FIG in matters that are ongoing today, and we

1 have continued to represent Mr. Flynn in separate
2 matters.

3 These involve many subjects that are
4 unrelated to the March 7, 2017, FARA filing, and they
5 include not just FIG but Flynn personally, General
6 Flynn personally. To require us to sift through that
7 to extract, say, fact work product on an unrelated
8 subject or for the representation of General Flynn
9 personally would be an extreme burden and would take
10 many weeks.

11 If, on the other hand, the Court were to
12 order that we provide the fact work product for the
13 pre-FARA filing, that, as I pointed out, would be
14 easier to digest. Even though it was a very intense
15 period -- December, January, February, early March -- a
16 little over three months of work versus the 24 months
17 of work that had been very intensive, as I'm sure
18 anybody who has read the press -- and I'm sure Your
19 Honor is familiar. It's been a very intensive
20 representation and generated many, many, many documents
21 during that period. Sifting through those would be
22 extremely burdensome.

23 Given the tangential relevance of any
24 documents in the Covington file, the admissibility
25 concerns, and the attorney-client and work product

1 issues, we submit that the Court should quash all of
2 category 8 beyond those documents that we've already
3 provided. As we point out in the papers,
4 alternatively, if the Court believes that the defendant
5 has gotten over the *Nixon* factors, including the
6 relevancy, then the limited production should be of the
7 fact work product that preceded the March 7, 2017, FARA
8 filing and that relate to that filing.

9 THE COURT: All right.

10 MR. JOHNSON: Thank you, Your Honor.

11 THE COURT: Thank you.

12 I'll hear from counsel for the other
13 non-party.

14 MR. WALKER: Thank you, Your Honor.

15 There are two principal concerns with respect
16 to the subpoena for our client, Kristen Verderame:

17 One, with respect primarily to No. 8 but --
18 well, with respect primarily to No. 8, is --

19 THE COURT: Are there documents within
20 category 8 that your client has?

21 MR. WALKER: My understanding is, yes, Your
22 Honor, there are documents within category 8.

23 THE COURT: All right.

24 MR. WALKER: And to a large extent, the
25 concerns that counsel on behalf of Covington expressed

1 are Ms. Verderame's concerns with respect to the
2 overbreadth of the subpoena, the lack of specificity
3 with which documents sought have been identified or, in
4 fact, not really identified at all other than the kind
5 of indiscriminate produce the whole file approach.
6 That clearly seems to be a violation of the exacting
7 specificity standard in *Nixon*.

8 Not just with respect to No. 8 but with
9 respect to all of the requests, there is as well,
10 particularly with respect to 1 through 7, I would say
11 substantial relevancy concerns. They seek documents to
12 the extent that they exist at all, which it seems
13 fairly plainly would be for the purpose of impeachment
14 use of extrinsic evidence for purposes collateral to
15 the facts that would be at issue at the trial.

16 THE COURT: So there are documents within one
17 1 through 7 that have not yet been produced?

18 MR. WALKER: Your Honor, with respect to
19 several of those categories, my understanding is that a
20 good faith production would not include documents with
21 respect to some of those categories, but with respect
22 to others, particularly with respect to No. 4 and
23 No. 7, there would be at least a limited extent of
24 documents.

25 THE COURT: All right.

1 MR. WALKER: With respect to No. 8, it's a
2 much different matter. I understood Your Honor to say
3 that the Court is reading request No. 8 to specifically
4 be seeking documents that are relevant to the FARA
5 filings.

6 THE COURT: Pertain to the relevant FARA
7 filing.

8 MR. WALKER: Yeah. I will second the point
9 made by Covington's counsel that to that extent and to
10 the extent that there are any documents relevant to the
11 FARA filings, that a cutoff date for relevancy would
12 appear to be March 2017 when the FARA filing was made.

13 Let me move to our client's other substantial
14 concern, Your Honor, which is with respect to the
15 privileged nature of many of the documents being sought
16 in request No. 8. To a certain extent, Ms. Verderame
17 is kind of caught in the middle on this privilege
18 issue. She was not a party and was not involved, to my
19 understanding, in any limited waiver of a privilege
20 which may have occurred previously in this matter.

21 Her concern is that by handing over documents
22 in response to this subpoena, particularly in response
23 to No. 8, without some clarification and resolution of
24 the issue of whether those documents may be or are
25 attorney-client privilege or subject to work product

1 protection, our client could be and would be in
2 violation of her ethical obligation under the D.C. Bar
3 rules to which she is subject.

4 If it were clear and if this Court were to
5 make clear that it views a waiver of privilege has
6 occurred to the extent that any documents would be
7 produced or, in the alternative, if the Court orders a
8 production of privileged documents, our client would be
9 in a different position and would be willing to produce
10 those documents.

11 As it now stands, Your Honor, there are
12 substantial concerns about our client's ethical
13 obligations with respect to turning over documents that
14 are privileged or with respect to which the issue of
15 privilege and work product protection has not been
16 appropriately resolved.

17 THE COURT: All right.

18 MR. WALKER: Thank you.

19 THE COURT: Thank you.

20 Counsel, Mr. MacDougall.

21 MR. MACDOUGALL: Thank you, Your Honor.

22 You know, Your Honor, the Court, as most of
23 us have, has lived around Washington for a long time --
24 most of my adult life. When you're in this
25 environment, you often here from people involved in

1 politics. There are certain methods that are used.
2 One is if you don't like your answer, change the
3 question. I think that's what we're dealing with here,
4 Your Honor, today.

5 Mr. Rafiekian is not seeking third-party
6 documents from some stranger, trying to extract them
7 using a Rule 17(c) subpoena. Mr. Rafiekian is only
8 seeking what he's entitled to as a director and
9 principal officer and shareholder of the corporation.

10 The Court is quite correct. Mr. Rafiekian's
11 interest in clearing his name and in resolving this
12 matter are identical to FIG's. It shouldn't be an
13 issue or objectionable to Mr. Flynn except to the
14 extent Mr. Flynn is seeking to use his cooperation to
15 reduce his risk of a custodial sentence.

16 Covington and Ms. Verderame are resisting the
17 subpoena ostensibly to protect the corporation, but the
18 truth, Your Honor, is that the corporation is now a
19 fiction. It is a rumor. It was dissolved, and I'll
20 speak more about that in a second.

21 Mr. Rafiekian is in the same posture as
22 Mr. Flynn, and all he asks the Court for, as counsel
23 conceded, is the same access as Mr. Flynn has.
24 Mr. Rafiekian was the incorporator and sole organizer
25 and initial director. He was at all times one of two

1 directors, essentially half of the board.

2 THE COURT: Wasn't there a third director at
3 one point?

4 MR. MACDOUGALL: There was, Your Honor, and
5 he resigned in 2016. His name was Philip Oakley. So
6 there was a third director for a period of time.

7 THE COURT: Before the Lobbying Disclosure
8 Act filing?

9 MR. MACDOUGALL: I believe so, Your Honor.
10 You'll have to check me on that, but I believe that's
11 correct.

12 THE COURT: All right. Was Rafiekian
13 originally named chairman in the bylaws?

14 MR. MACDOUGALL: Yes, Your Honor, I believe
15 that's right.

16 THE COURT: When did that change happen?

17 MR. MACDOUGALL: Sometime in 2016, but again,
18 I would have to check the documents to give you those
19 dates.

20 THE COURT: All right.

21 MR. MACDOUGALL: And the Court touched upon
22 this. Mr. Rafiekian did, in fact, pay personally, on
23 the request of Ms. Verderame and on a request
24 ostensibly conveyed from Covington, the legal fees,
25 \$55,000 in two payments, January and February 1917

1 [sic], on urgent request from Mr. Flynn personally,
2 from Mr. Flynn's son, and from Ms. Verderame.

3 THE COURT: Who was that paid to?

4 MR. MACDOUGALL: That was paid to FIG. It
5 was deposited into FIG's account for the purpose of --
6 and as the e-mails will clearly demonstrate, for the
7 purpose of paying legal fees.

8 THE COURT: For both firms?

9 MR. MACDOUGALL: Yes, Your Honor. Well, in
10 some instances, it references payments to counsel, and
11 in others, it was specific to Covington.

12 THE COURT: All right.

13 MR. MACDOUGALL: Covington and Ms. Verderame
14 say the corporation is dissolved, so Mr. Flynn gets to
15 make all the decisions. He's the CEO and the chairman,
16 so he gets to decide that he can use the files for his
17 purposes, but Mr. Rafiekian can't even see them.
18 Mr. Flynn ostensibly instructs counsel to resist the
19 subpoena and keep Mr. Rafiekian from the file.

20 Here's the thing, Your Honor. Here's what
21 counsel didn't talk about. Here's what wasn't
22 responded to anywhere in the pleading, so I take it as
23 conceded. Mr. Flynn signed a false declaration that
24 was submitted to the Delaware secretary of state in
25 April 2018 dissolving the corporation. It was false

1 because it recites, as required under the Delaware
2 General Corporation Law, that you have a shareholder's
3 meeting which would have required notice to
4 Mr. Rafiekian and notice to Mr. Trout and a board
5 meeting, which would have required notice. Those did
6 not happen.

7 We raised that in our motion for the
8 subpoenas. We raised it in the pleading here. Counsel
9 for Ms. Verderame and counsel for Covington have never
10 responded to that. That, Your Honor, is the pivot
11 point at which Mr. Flynn and his counsel say: Now I
12 have all the power.

13 They have all the power because they filed a
14 false declaration, dissolved the corporation, kept the
15 information from Mr. Rafiekian and his counsel at the
16 time, and now they say: And now we win.

17 That, Your Honor, to me and to Mr. Rafiekian
18 is a shocking set of circumstances. I can't address
19 questions to counsel in court obviously, but the Court
20 can. To the extent the argument is that Mr. Flynn is
21 now a solo superior officer, the only reason he has
22 that power is because of that false declaration that's
23 never been addressed.

24 Now, both counsel for Ms. Verderame and
25 counsel for Covington rely upon what I would

1 characterize as --

2 THE COURT: How do you view the consequence
3 of that dissolution based on that affidavit?

4 MR. MACDOUGALL: Well, Your Honor, I
5 believe --

6 THE COURT: How does that impact on the
7 enforceability or lack of enforceability of the
8 privilege or anything else that we're dealing with?

9 MR. MACDOUGALL: Well, if the corporation had
10 not been dissolved, Mr. Rafiekian would have equal
11 rights as one of two directors to Mr. Flynn. He could
12 call a board meeting. At that board meeting, he could
13 say, "Here are my reasons," just as we're trying to
14 articulate to the Court today, "for wanting access to
15 the file."

16 Your Honor, I've had lots of corporations
17 dissolved in my career. A former director calls up and
18 says, I'd like to see the file.

19 Okay. We'll get a conference room for you.
20 Here it is.

21 This is not an issue that ought to be
22 confronting Mr. Rafiekian as he tries to defend himself
23 in this case. So he would have equal access had that
24 not happened, but it did happen. It happened, and it
25 was wrong. No one has explained it. Now, Covington

1 and Ms. Verderame seek to take advantage of that, and
2 that is really just not right, Your Honor.

3 They do seek to rely on what I think is a
4 gross misinterpretation of Section 278 of the Delaware
5 General Corporation Law. It's captioned Continuation
6 of Corporation After Dissolution for Purposes of Suit
7 and Winding Up Affairs.

8 What they've embarked on is an entirely new
9 campaign of cooperation to benefit Mr. Flynn. They're
10 not winding up some lingering lawsuit or selling off
11 some office furniture. They're involved in an
12 aggressive campaign as reflected in the June 13, 2018,
13 letter to the U.S. Attorney of the agreement to seek to
14 provide Mr. Flynn with a vehicle to enhance his
15 cooperation. That's all that's happening here. This
16 is not about dissolution or winding up.

17 Covington and counsel in his remarks to the
18 Court acted as if the corporation is still alive.
19 Well, it's not, Your Honor, and it's very clear in the
20 Delaware General Corporation Law that when that
21 certificate of dissolution, false though it may be, is
22 certified by the secretary of state, the corporation is
23 dissolved. This is not cleanup activity. This is
24 entirely new effort.

25 Your Honor, Covington will testify in this

1 case. There's no question about that. As the Court
2 pointed out, starting in paragraph 53 of the
3 indictment, there are frequent references to
4 Mr. Rafiekian made a false statement. There's an
5 entire caption: Mr. Rafiekian made a false statement.
6 Covington will be asked about their thought processes
7 at the trial.

8 In their letter of June 13, 2018, they wrote:
9 We understand that you, the government, are seeking his
10 cooperation pursuant to his plea and cooperation
11 agreement with the special counsel's office.

12 The "he" and the "his" is Mr. Flynn.

13 Months after the corporation was dissolved,
14 Covington certified -- wrote to the government with his
15 detailed waiver. For the government, this is all in
16 furtherance of his cooperation.

17 Now, there's no issue with regard to
18 privilege regarding the Flynn Intel Group, we would
19 submit to the Court. The client is just seeking access
20 to a legal file that he has a lawful right to. Once he
21 has access, if there are privilege issues, those can be
22 worked out with counsel or, if necessary, with the
23 Court's assistance. The Court can deal with the
24 question of showing the prosecutors the file with a
25 protective order.

1 There is no request -- and this is important
2 from our perspective, Your Honor. There is no request
3 for Mr. Flynn's personal records. We assume that
4 Covington and Ms. Verderame, to the extent she was
5 involved, did the appropriate, as required by the Code
6 of Professional Responsibility, steps to segregate out
7 those two files.

8 The suggestion that Mr. Flynn waived to
9 protect the corporation after he had dissolved the
10 corporation is unbelievable, Your Honor. There is no
11 question he waived because he was a government
12 cooperator. He waived because the government wanted
13 his evidence. He waived because he did not want to go
14 to jail.

15 The corporation had been illegally dissolved.
16 It had no assets, no business, and Mr. Flynn contends
17 that his was a proper business purpose and
18 Mr. Rafiekian's is not. This is all about Mr. Flynn's
19 personal interest.

20 The lawyers say Mr. Rafiekian cannot have the
21 same access because it's not a business purpose, and
22 that is just, Your Honor, unbelievable. If there's any
23 doubt about that, Mr. Kelner in Covington's remarks on
24 December 18, 2018, at Mr. Flynn's first sentencing
25 hearing made that clear where he specifically asked

1 Judge Sullivan for an extension. I can quote for the
2 Court's record. He asked Judge Sullivan for an
3 extension so that Mr. Flynn can testify in his case,
4 ostensibly help the government obtain a conviction, and
5 thereby get credit for it.

6 With respect -- Your Honor, I'll address
7 briefly; although, I don't think Your Honor has to
8 reach the three-part test in *U.S. v. Nixon*. These
9 documents are extremely relevant. The Court need only
10 look at the indictment starting on page 13 to see just
11 how relevant they are. Mr. Rafiekian is accused of
12 making false statements to the company's lawyers.

13 With respect to admissibility, there are many
14 avenues for which these documents are admissible.
15 We're not talking about extrinsic evidence to be used
16 in impeachment. There are time and billing records.
17 Those are clearly business records. There may well be
18 party admissions with respect to statements of the
19 government. There may be, as the Court noted, the
20 information that reflects the lawyers' statement of
21 mind when they contend to the government -- and as they
22 will presumably testify at trial -- they were lied to.

23 The third prong, Your Honor, of specificity,
24 this is not a fishing expedition. This is nothing like
25 *Rand*. What's contained in a legal file is extremely

1 specific, called for under the Code of Professional
2 Responsibility. All we have here is a client who wants
3 access to a legal file to which he's entitled and to
4 which the law of Delaware, the state of incorporation,
5 treats him as an equal director.

6 My question, Your Honor, in closing is what
7 equities is Covington and what equities is
8 Ms. Verderame trying to protect?

9 Are they trying to protect the corporate
10 integrity of the Flynn Intel Group? The corporation
11 was unlawfully dissolved, Your Honor. There is nothing
12 there to protect.

13 Are they trying to protect General Flynn
14 himself? He's an immunized cooperator. He's really
15 not at risk. What he's trying to do is improve his
16 prospects at sentencing. I don't blame him for that,
17 but to use the vehicle of trying to deny evidence to
18 Mr. Rafiekian is entirely improper.

19 Are the lawyers trying to protect themselves?
20 That's a possibility, and I leave that to the Court to
21 consider. The unexplained, unlawful certification, I
22 think, raises that question in a very serious way.

23 Covington had Flynn Intel Group sign an
24 engagement letter. Presumably, so did Ms. Verderame.
25 Under that engagement letter, if a conflict arises, as

1 these letters typically say, Covington says: We get to
2 keep General Flynn.

3 But then what happened? What happened was
4 General Flynn was indicted. General Flynn pled. I'm
5 sorry. I'll correct that. General Flynn was never
6 indicted. He pled by information. He pled and became
7 a cooperator. Through this entire process which reeks
8 of conflict, Covington remained counsel to Flynn Intel
9 Group, continued to do that work, and at no time
10 asserted that the conflict was so severe that they had
11 to get new counsel for Flynn Intel Group. I would
12 submit that if there were different counsel, we'd be
13 having a different discussion today.

14 Lastly, Your Honor, I would ask the Court to
15 note on page 8, footnote 12, of our opposition the
16 reference to cases that call for fairness. This Court
17 will, of course, always be fair. All we're asking here
18 is that the Court protect this citizen from the lawyers
19 who have his file and provide him with the opportunity
20 and his counsel to look at that file and to deal with
21 its consequences.

22 Thank you, Your Honor.

23 THE COURT: All right. Thank you.

24 Counsel, let me ask a couple of questions.

25 MR. JOHNSON: Certainly.

1 THE COURT: How do you view the significance
2 of the corporation's dissolution? How do you see that
3 as bearing on these issues?

4 MR. JOHNSON: I don't think it has any
5 bearing, Your Honor. The defendant wants to have it
6 both ways. As I heard defendant's counsel say, well,
7 it was dissolved, but maybe it wasn't dissolved
8 legally. So, therefore, maybe it didn't have any
9 effect. It has no effect under Delaware law because
10 under Delaware law, as we pointed out -- and the
11 defendant has not refuted this or challenged it. Under
12 Delaware law, a corporation continues for a period of
13 three years after it is dissolved for purposes of being
14 sued, which would include the ability to assert
15 privilege under these circumstances.

16 THE COURT: So who has authorized or directed
17 FIG's position with respect to this subpoena?

18 MR. JOHNSON: That would be the CEO and
19 chairman and majority shareholder General Flynn.

20 THE COURT: So he has directed to resist the
21 subpoena?

22 MR. JOHNSON: Correct.

23 THE COURT: All right.

24 MR. JOHNSON: With respect to the equities,
25 which is where counsel left off, the question really

1 here is not one of equities. The question is one of
2 ethics. Are we ethically bound not to produce this
3 data? The answer is yes. Does Mr. Rafiekian have a
4 right to that? The answer is no.

5 You asked, Your Honor: Why does Rafiekian
6 not have the same corporate purpose that General Flynn
7 has? And the answer is as FIG, and when his defense
8 helped FIG, the answer is no because FIG has not been
9 charged.

10 As a result of FIG's decision through its CEO
11 and chairman to cooperate with the government, FIG has
12 not been charged in the same matters that Mr. Rafiekian
13 is subject to. As a result of that cooperation,
14 there's no charge. Therefore, the interests are not
15 the same. What he's doing is trying to seek them --
16 seek these documents for his personal purposes.

17 I have never seen anything that defendants
18 have said in either their papers, nor have I heard
19 anything this morning indicating that Mr. Rafiekian is
20 seeking them for any corporate purpose. He contends,
21 well, he's a codirector and that he can call a board
22 meeting. The plain fact -- and they don't dispute
23 this -- is that Mr. Rafiekian has fewer shares than
24 Mr. Flynn. He would get outvoted. This is what
25 happens in a corporation. Somebody is elected.

1 Mr. Flynn was not elected contrary to counsel's
2 suggestion.

3 THE COURT: There are other shareholders;
4 aren't there?

5 MR. JOHNSON: Excuse me?

6 THE COURT: There are other shareholders?

7 MR. JOHNSON: Actually, Your Honor, it's my
8 understanding that at some point in 2016, the third
9 shareholder cashed out. So there are only the two, and
10 General Flynn has the majority of the shares.

11 THE COURT: That's 350, and Rafiekian has
12 300.

13 MR. JOHNSON: Correct.

14 So because of the way they set up the company
15 and before dissolution and before these events
16 occurred, as counsel conceded, Mr. Flynn, General Flynn
17 was appointed -- elected as the CEO and as the
18 chairman. Mr. Rafiekian gave him that power at the
19 time. He said, General Flynn, you have the authority
20 to make these types of decisions.

21 He gave that authority, and under corporate
22 law, he has the authority that the corporation acts --
23 exercises or waives the privilege through its executive
24 officers. If Mr. Rafiekian thinks that he has some
25 corporate right, then this is not the place to litigate

1 that. He can file some action under Delaware law to
2 try to assert his rights.

3 The reason he hasn't done that is because in
4 order to do so, he would have to allege that he wants
5 the documents for a corporate purpose. He doesn't have
6 a corporate purpose. He has a personal interest in
7 trying to defend himself, but he's not seeking these
8 documents for any corporate purpose. The dissolution
9 has nothing to do with it. He just doesn't have the
10 votes under Delaware law to get access to these
11 documents.

12 Your Honor raised the crime fraud exception,
13 and Mr. Kelner points something out to me that I would
14 like to share with the Court. The government hasn't
15 contended that. I'm not sure that the Court can *sua*
16 *sponte* suggest that there's a crime fraud exception.
17 Certainly, the reason the defendant hasn't asserted it
18 is that for him to assert it, he'd be essentially
19 admitting guilt. So crime fraud here is not an issue.

20 THE COURT: I understand.

21 MR. JOHNSON: Instead, the question is
22 whether he has a right to these documents. The answer
23 is no. Has he been specific? The answer is no. Can
24 he get access to privileged documents or opinion work
25 product? The answer is no and no. There is one area

1 of potential relevance as I concede, Your Honor, which
2 is the fact work product prior to March 7, 2017, that
3 Covington has in its files. Anything else would be
4 burdensome and privileged. It would be work product,
5 and it is not subject to the subpoena.

6 THE COURT: All right. Thank you.

7 Counsel, I will give you the last word.

8 MR. WALKER: Thank you, Your Honor. I just
9 want to make one point briefly, and that is in response
10 to a remark from Mr. MacDougall. Nothing in the
11 filings in this matter or in the record before the
12 Court in this matter should be taken as a concession on
13 the part of or on behalf of Ms. Verderame that the
14 corporate dissolution certification was false. Really,
15 I just want to emphasize that point for the record.

16 I also do want to point out, Your Honor --

17 THE COURT: As I understand it, it was simply
18 a misstatement that it was authorized by all the
19 directors or all the shareholders.

20 MR. WALKER: Your Honor, I am only in a
21 position to say that no concession has been made here.
22 I'm not in a position and I don't have facts that I can
23 put before the Court either directly or indirectly. I
24 just want to make clear that there's been no concession
25 at that point, which is a factual point.

1 THE COURT: All right.

2 MR. WALKER: The other thing, Your Honor, is
3 to stress on behalf of Ms. Verderame that, again, she
4 is willing and wanting to cooperate to the extent of
5 providing relevant and admissible material in response
6 to the subpoena provided it could be done consistent
7 with her ethical obligations which are paramount for an
8 attorney to follow. It's not a minor issue, and it's
9 not an issue that should be taken as indicating hiding
10 anything. It's a paramount obligation on behalf of
11 Ms. Verderame.

12 Thank you.

13 THE COURT: Thank you.

14 The Court is going to direct that counsel
15 produce fact work product documents prefiling, that is
16 on or before the March 7 FARA filing. So the motion to
17 quash is denied to that extent.

18 The Court is going to take under advisement
19 the balance of the motion, and I'll get a decision to
20 you shortly.

21 I would suggest to counsel that they -- and
22 I'm not suggesting that I've ruled on this. But given
23 the trial date, that counsel begin the process of
24 segregating its file pertaining to the FARA filing both
25 before and after the filing and the file as it relates

1 to other extraneous matters. I will try to get a
2 decision to you shortly.

3 All right.

4 MR. JOHNSON: Thank you, Your Honor.

5 MR. MACDOUGALL: Thank you, Your Honor.

6 THE COURT: All right.

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Time: 9:56 a.m.

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I certify that the foregoing is a true and
accurate transcription of my stenographic notes.

/s/
Rhonda F. Montgomery, CCR, RPR